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# Address Delivered Before the West Los Angeles University Synagogue on the Fifth Amendment to the Constitution of the United States

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ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER OF THE SUPREME  
COURT OF CALIFORNIA BEFORE THE WEST LOS ANGELES UNIVERSITY  
SYNAGOGUE FORUM AT THE UNIVERSITY HIGH SCHOOL IN LOS ANGELES  
ON FEBRUARY THE 16TH, 1954, ON THE FIFTH AMENDMENT TO THE  
CONSTITUTION OF THE UNITED STATES

The Fifth Amendment to the Constitution of the United States provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added.) This amendment was adopted in 1791. In California, at

the present time, our Constitution provides (art. I, § 13) in part "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. " (Emphasis added.)

You have all no doubt read, and heard, a lot about the privilege against self-incrimination. That privilege is guaranteed to the individual by both the federal and state Constitutions in the provisions which I have just read to you.

As you all have learned, both Constitutions are subject to construction and interpretation by the federal courts, including the Supreme Court of the United States, and by the courts of California, including the Supreme Court of which I am one of the seven justices. The construction and interpretation placed on both Constitutions by the highest courts of the land -- the United States Supreme Court, so far as federal questions are involved -- and the Supreme Court of California, so far as state questions are involved -- are binding on all lower courts of both the federal government and of the State of California.

Inasmuch as the federal Constitution was adopted first, I think it well to give you a very brief resumé of the reasons leading to the adoption of the Fifth Amendment on which the comparable provision of the state Constitution was patterned in order that you may understand why it was felt necessary to safeguard the individual from being compelled to convict himself. Beginning in about 1236 A.D. in England, there were ecclesiastical courts. These courts took upon themselves much

of the burden of settling various disputes -- not only those relating to church law and custom, but various other types of disputes. It was the practice of these courts at that time to submit both the great and humble to what was called an "oath ex officio." The purpose of this inquiry was to discover suspected violations of church law or custom, or to establish the truth of either vague or definite charges not disclosed to the person questioned. If the persons summoned to appear not do so, they were excommunicated; if they did appear, were forced to give testimony, under oath, of not only the private sins of themselves, but of others. This practice continued, despite various orders from the reigning kings that the King's Courts had exclusive jurisdiction over all except matters of Matrimony and Testament and that they were expressly prohibited from holding such pleas in their courts. However, in criminal cases before the King's Council during this same period, an accused was required to appear in person, without counsel, and to answer the charges which were most likely not

known to him in advance. If the accused did not immediately confess or explain the charges, he was put to the method known as the interrogatory examination. This practice brought such protest from the Commons that a statute was passed which provided that charges must be preferred against an accused by indictment or presentation and that "no man should be put to answers . . . [without] . . . due process and writ original, according to the old law of the land." This statute, however, was not long in effect and again the "oath ex officio" was the common practice. As each new monarch gained the throne, the measures put into effect by the preceding monarch were undone. All that can safely be asserted is that the common lawyers both in the second half of the 13th and all of the 14th centuries and under Henry VIII and Elizabeth, resisted the inquisitorial procedure of the spiritual courts, whether Romish or English, and under Elizabeth, began to base their opposition chiefly upon the principle that a person could not be compelled to furnish under oath answers to charges which had not been formally

made and disclosed to him, except in causes testamentary and matrimonial. To common lawyers a system which required a person to furnish his own indictment from his own lips under oath was repugnant to the law of the land. About 1640, the accused began to claim, and the judges to concede, that a man on trial could not be compelled to answer questions which would disclose his guilt. Such compulsion was held to be "illegal, most unjust, and against the liberty of the subject, and law of the land, and Magna Charta, and unfit to continue upon record. "

However, the privilege was not absolute. When a prisoner was arraigned, he was required to identify himself by holding up his right hand or by expressly admitting that he was the person charged. Then he was asked how he would plead -- whether guilty or not guilty. If he refused to plead, the penalty depended upon the grade of the offense with which he was charged. If treason or a misdemeanor, he was treated as if he had pleaded guilty; if a felony, he was confined to prison with a meagre allowance of bread on one day and water the next.

Later, in addition to the alternate bread and water diet, he was subjected to pressure -- which meant just that: a sharp stake, or piece of wood was placed under him, and a heavy weight sometimes as great as 400 pounds put on top of him. This usually killed him, or induced him within a period of an hour or so, to plead either guilty or not guilty. Usually, even if the accused pleaded not guilty, the jury found him guilty and sentenced him to hang. This horrible and barbaric practice was not discontinued until 1772. At that time the statute of 12 Geo. III provided that if a person stood mute on his arraignment of piracy or felony, he should be convicted and the court should award judgment and execution as if he had been convicted by verdict or confession. In 1827, standing mute in any criminal case was by statute (7 & 8 Geo., IV) made the equivalent of a plea of not guilty.

From the middle of the 16th century to the middle of the 19th, the accused was subject to a preliminary examination before a committing magistrate and was expected to answer. He



was not warned that he need not answer. If he refused to answer, or if he did answer, it was reported and put in evidence at his trial. Up to the middle of the 17th century, torture was used to extort confessions and no one seriously contended that such confessions were not admissible against the accused. In the 18th century, the accused began objecting to the use of coerced confessions, but it is not clear on just what ground the objections were sustained: whether the coercion affected the weight of the evidence, or whether confessions obtained by duress and violence or promises of benefit were considered to be not exactly reliable.

This, then, was the background in brief, which led our forefathers to the firm conviction that no man should be compelled to testify against himself.

If one is accused of something, or is asked questions about something, the logical way of looking at his refusal to answer is that he surely must know something about it or else why would he refuse to answer? In other words, it is said that the refusal to answer gives rise to an inference of guilt

of something. In California, our law provides that an inference is a deduction which may be drawn from facts proven. Now, looking at this matter as intelligent men and women, has the fact that our hypothetical person has refused to answer questions proven anything? The only thing that is sure is that our witness has refused to answer. So far as I am concerned, there are no less than three inferences which may be drawn from such a refusal to testify: (1) That the witness is guilty; (2) that he knows something, or some fact, which might tend to incriminate him. Note that this second ground is not the same as the first And/or (3) that he refuses to answer because he feels that the inquisitor has no right, and/or business, to ask him such questions. If we go back to the common law as it finally developed, we find that standing mute, in legal effect, pleads not guilty. How can standing mute carry any danger to the accused when it is the legal equivalent of a plea of not guilty? A canon of our law is that it is to be interpreted reasonably in view of accepted common law procedure. We have the old

common law which says, in effect, that standing mute is in legal effect a plea of not guilty. We have the present day common assumption that if the witness doesn't answer, he must have something to hide. And we have the constitutional provisions which say, positively, that no man shall be compelled to be a witness against himself. If he refuses to answer is he, in effect, pleading guilty to an offense of some sort with the consequent stigma attaching? Or is he merely standing on his constitutional right which has been guaranteed to him, and if so, should he not be relieved of any and all blame for having claimed that right? If an inference of guilt arises, might he not as well answer all questions even though his answers thereto might tend to incriminate him?

The privilege against self-incrimination has been held by the courts to apply in all judicial investigations;<sup>1</sup> to proceedings before a grand jury;<sup>2</sup> and to Congressional

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<sup>1</sup> Smith v. United States, 69 S.Ct. 1000.

<sup>2</sup> Blau v. United States, 340 U.S. 159.

investigations.<sup>3</sup> The privilege has been characterized by Judge Cardoza (Matter of Doyle, 257 N.Y. 244; 177 N.E. 489) as "a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State" which "neither legislators nor judges are free to overleap. . . ." In the light of this definition, let us consider a Congressional investigation. A person called upon to testify there is only meagerly advised of the subject to be pursued; he is not as a rule represented by counsel and even if he is, since it is not an adversary proceeding, his counsel has no right to object to the proceedings; the lights are bright in the legislative committee room; newspaper men are present as are photographers and television cameramen. There are none of the safeguards of the courtroom -- there is no right to confront the witnesses accusing our "person"; there is no judicial calm; our witness has only the Fifth Amendment with which to protect himself.

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<sup>3</sup> United States v. Yukio Abe, 95 Fed.Supp. 991; United States v. Emspak, 95 Fed.Supp. 1012.

Suppose our witness is willing to answer all questions concerning himself, but is not willing to answer questions which might tend to incriminate others whom he knows, or has known. May he answer the questions whose answers are personal to himself and refuse to answer the others? No, he may not. This is because of the rule of waiver. The meaning of this rule is that if a person is willing to testify and does not claim the privilege of silence, he may then be questioned concerning any related matter. That which is related and that which is not related is the subject of much controversy which has been resolved in favor of permitting the widest possible inquiry. It is well known that Congressional committees use witnesses as a means of getting information about other people. The witness has three choices in such a situation: (1) He may become an informer; (2) he may testify about himself and refuse to name others and go to jail for contempt; (3) he may claim the privilege in regard to himself although he would have preferred to tell all things personal to himself.

Let us carry our supposititious case one step farther:

Suppose our witness claims the privilege. What then? To the average mind, he has effectively admitted his guilt of the crime under consideration, whatever that may be. As for penalty, this witness does not yet go to jail, but there are other penalties just as severe. He loses his job, or position; he is subject to severe criticism; he is subjected to adverse newspaper and radio publicity, commensurate in degree with his prominence in the public eye. He also has placed himself on the list of suspected persons and has guaranteed that more minute investigation will be made concerning him in the future.

Suppose he has not claimed the privilege and has freely answered questions concerning his past and present life. If some of his answers do not tally exactly with what other witnesses have said, then he runs the risk of a prosecution for perjury. When one remembers something that occurred perhaps thirty years prior to the time he is recalling it, it is very likely that his recollection might differ from that of another

person recalling the same transaction. In a court of law, this would merely create a conflict in the evidence, the resolution of that conflict resting with the trier of fact whether judge or jury. In a Congressional investigation, such a conflict may expose one or the other of the witnesses to a prosecution for perjury. Again, remember that at the investigation, our witness has no right to confront his accuser and ask him questions or, at that time, to rebut what his accuser has said. That right of confrontation guaranteed by both the federal and state Constitutions does not apply at such an investigation but only at a judicial proceeding. At a Congressional investigation, a witness is accorded none of the safeguards known to the law and which we refer to as "due process of law." Is there not an analogy between such a proceeding and the situation as it existed in England in the 15th, 16th and 17th centuries? A witness compelled to answer and to provide his accusers, by reason of his own silence, or testimony, with the case against himself? In other words, the result is very likely to be that

whichever choice he makes, he stands convicted. In a judicial system in which the accused must answer all questions, the police might be tempted to get the answers they wanted by any available means. The history of our criminal law reveals that there are no short cuts to justice: a case must be made against an accused who is innocent until proven guilty. He does not have to prove his innocence; the prosecution must prove his guilt. As Mr. Justice Holmes said: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."<sup>4</sup>

Let us again suppose that our witness claims the privilege conferred by the Fifth Amendment, and let us assume that he is wholly innocent of any crime. He may do so for several reasons: (1) He may have done something, or said something, or joined some organization which was, at the time it was done, said, or joined, devoid of any criminal aspect and may be so even at the time of the investigation, but his answers

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<sup>4</sup> Olmstead v. United States, 277 U.S. 438.



might be offered as evidence against him in a criminal case;

(2) he might be willing to answer questions about himself, unwilling to answer them about others, and thus afraid to answer the personal questions because of the doctrine of waiver; or 3) he might be afraid that truthful answers might not check with answers given by someone else and thus subject him to a prosecution for perjury; or (4) he might simply and honestly disapprove of the entire investigation and the methods by which such proceedings are conducted, feeling that the questioning is not in accord with the principles of democracy laid down by the Framers of our great Constitution for this wonderful country known as America. These reasons show that an inference of guilt is not the only inference to be drawn when the privilege is claimed

In America, by constitutional provision, we have rule that the government of this country shall be divided into three parts: The executive, legislative and judicial branches and that these three branches shall remain separate and apart

one from the other. By its Congressional investigations, the legislative branch is, theoretically, questioning to aid in legislative functions. This is the only purpose for which such investigations are permitted. To permit such investigations for any other purpose would be an invalid encroachment upon judicial branch of the government. From what we have read and heard of present day Congressional investigations, it is difficult to say that the investigations can serve any useful legislative purpose, but it is not difficult to see that they appear to encroach on the exclusive jurisdiction of the courts without the judicial safeguards which there prevail

How far does the privilege go? Does it extend to papers, writings and personal effects? The Supreme Court of the United States has held that it does not protect an individual from producing in response to a subpoena (a) a writing which is of a public, or a semi-public character or (b) a writing of which he is not entitled to possession in his capacity as an individual. Does it apply to the individual himself? Does it

cover personal features, qualities, or conditions which he can not control? Does it apply to the objective appearance of the individual's body, his measurements, his fingerprints, his footprints, his saliva, his breath, his blood? The answer is no, that it does not. It has been held that blood taken from an unconscious person may be used in evidence against him;<sup>5</sup> it has been held that an accused may be forced to exhibit himself in the courtroom; try on hats, coats, shoes and the like; it has been held that a doctor examining an accused for drunkenness may testify as to his findings made after various tests. In California, it was held proper for the contents of a stomach taken forcibly by means of a stomach pump by officers of the law to be used to convict one accused of narcotic addiction. The Supreme Court of the United States, however, reversed a majority of the Supreme Court of California and held that such conduct on the part of law enforcement officers shocked the conscience of mankind and was a denial of due process of law.

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<sup>5</sup> State v. Cram, 176 Ore. 577; People v. Haeussler, 41 A.C. 256.

There can be no doubt that we are living in an age which, as a great man once said, "are times that try men's souls." We are constantly warned that we are surrounded with subversion from within and without. There can be no doubt that the entire world is in conflict. There can be no doubt but that the world has been in conflict before. Our forebears and we have weathered a Civil War, a Revolutionary War, and two great world wars, to say nothing of lesser affrays. We must not forget that our great Constitution was written because the Framers were firmly convinced that while individual rights must be circumscribed for the public good, those rights should be preserved as fully as was possible to the end that every individual should be accorded freedom of religion, of speech, of press, of peaceable assembly, that the right of privacy should not be violated, and that no person should be deprived of his life, his liberty, or his property without due process of law

In times such as these in which we are now living, when suspicion and distrust of one's neighbor is the rule, rather than the exception, we must strive for a calm attitude. We must not allow ourselves to become hysterical and we must remember that our forefathers fought a bitter and terrible fight that we might have our Constitution and its safeguards for the individual. We must not permit legislation to be enacted without considering the balance between the object to be achieved and the liberties of the individual; we must study any such proposals with the greatest of care and caution.

There is now proposed a national law which would grant immunity from criminal prosecution to all who will testify concerning not only themselves but others. This law is proposed, primarily, as a means of overcoming the invocation of the Fifth Amendment by persons subpoenaed by Congressional committees. It is extremely dubious if the law would have the desired effect. For one thing, the immunity granted would, and could be, only immunity from federal prosecution. Another

reason is that any determined, unrepentant person engaged in subversive activity would still claim the Fifth Amendment. In an excellent article, written by Dorothy Thompson ("Satan Versus Beelzebub, Ladies Home Journal, February, 1954), she comments on the proposed law as follows: "The proposed law will not, I think, result in obtaining more evidence from reliable witnesses. Communists determined to keep the party's records secret will still invoke the Fifth Amendment; communists wishing to protect themselves and important members of the party at the cost of lesser fry will exploit the law; ex-communists who hate tattling obviously will not be moved by promises of immunity for themselves.

"It is a law for the protection of informers who are to be elevated into a position of special grace. And if such a law becomes sweet to the taste of the people, we shall be just a little nearer the point of an informer in every factory, apartment house, office and block, of children informing on their parents and teachers; just a little nearer to the end of all mutual trust, all social happiness, all freedom.

"In short, we shall be nearer to every evil that we hate, loathe and despise in communism. This is certainly not the vision or desire of Mr. Brownell."

I think there has not been a day in the past, nor is there a day in the present, when all of us do not thank God that we live in America where we have freedom, equality and justice for all -- not just for a few. The practices which prevailed in Nazi Germany, and which we hear prevail in Russia and Communist-dominated countries, are abhorrent to all free Americans. If we are to keep our heritage of freedom, we must remember that the freedoms guaranteed to us by our Constitution are freedoms for all -- for every person. Those accused of crime must be accorded every safeguard prescribed in order that those unjustly accused may not suffer the penalties which the law provides shall be inflicted on those found guilty after a fair and impartial trial. If we do not remember the fundamental basis on which our Constitution rests and work to preserve its mandates, then we shall be no better off than the

peoples of those countries where freedom, equality and justice  
for all is not the rule.